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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA	)	
	)	CR 05-07-M-DWM
Plaintiff,	)	
	)	
vs.	)	
	)	**DEFENDANT HENRY A. ESCHENBACH'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 AND MEMORANDUM IN SUPPORT THEREOF**
W. R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, and ROBERT C. WALSH,	)	
	)	**ORAL ARGUMENT REQUESTED**
Defendants.	)	
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Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, defendant Henry A. Eschenbach hereby moves[1] this Court to enter a judgment of acquittal on Count I, on the ground that the government has not presented sufficient evidence for a reasonable jury to find Mr. Eschenbach guilty beyond a reasonable doubt.

I. INTRODUCTION

The defendants long ago advised the Court that the government's case was founded on a distorted rendition of the "facts" alleged in the Superseding Indictment. The Court advised the defendants that there would be an appropriate time to evaluate the quality of the evidence. We are at that critical juncture now.

The Court and the jury have now heard 24 days of government testimony from 46 witnesses, as well as hundreds of government and defense exhibits. The only reasonable conclusion that may be drawn from the government's evidence is that there is a total absence of evidence to support the charge of conspiracy against Mr. Eschenbach. No evidence has been presented of an agreement to violate the law, the bedrock of the charge of conspiracy. Instead, the government's evidence shows simply that Mr. Eschenbach was a health and safety official at Grace; that he, like many others, learned in the course of doing his job of the adverse health effects to workers of exposure to high levels of asbestos; that vermiculite and

[1] Pursuant to Local Rule 12.2, Defendant Eschenbach, by and through his counsel, has contacted the Government, which opposes this motion.

products containing it have a propensity to release tremolite fibers when disturbed; that he attended one meeting with NIOSH where he disclosed those adverse health effects; that he sent a letter to EPA in which he reported on the health effects of asbestos on Libby employees; and that he received and sent routine business correspondence as part of his job duties. But just as the Superseding Indictment was drafted "as a historical compendium of the Defendants' alleged wrongful acts, without regard for whether those alleged acts relate in any way to a federal criminal offense," Order at 3, Apr. 23, 2009, Dkt. 1104, so too did the presentation of evidence at trial fail to relate to the offense of conspiracy with which Mr. Eschenbach is charged.

As discussed more fully herein, Mr. Eschenbach's motion should be granted for the following reasons:

- The evidence is insufficient to prove beyond a reasonable doubt that Mr. Eschenbach conspired to knowingly endanger anyone.
- In particular, there is no evidence showing that Mr. Eschenbach was involved in a conspiracy to knowingly endanger after November 15, 1990.
- The evidence is insufficient to prove beyond a reasonable doubt that Mr. Eschenbach conspired to defraud EPA or NIOSH because there is no evidence of an agreement; there was no "clearly impose[d]" legal

duty to disclose to EPA information in Grace's possession that it allegedly withheld; and evidence of a disagreement with NIOSH over its proposal to conduct a "vermiculite" study does not impair or interfere with a lawful governmental function.

The broad federal conspiracy statute has long been recognized by courts and scholars as posing a serious threat to due process because it invites prosecutors to arbitrarily attempt to "punish activity not properly within the ambit of the federal criminal sanction." *United States v. Shoup*, 608 F.2d 950, 955-56 (3d Cir. 1979). *See also* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959). For that reason, the Supreme Court has imposed the obligation to scrutinize conspiracy charges carefully to ensure that people are convicted only for using "deceit[ful]" or "dishonest" means to obstruct a lawful governmental function. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *see also United States v. Dennis*, 384 U.S. 855, 860 (1966) (citing "the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable"). Here, the government has attempted to stretch the conspiracy statute far beyond its appropriate bounds, but the time has come to recognize that the evidence simply does not prove a crime. No reasonable jury could conclude otherwise.

We respectfully submit that careful scrutiny of the evidence in support of the conspiracy charge leads to one conclusion—there is an absence of proof, and a judgment of acquittal must be entered in favor of Mr. Eschenbach.[2]

II. LEGAL STANDARDS

In evaluating a motion for judgment of acquittal under Fed. R. Crim. P. 29, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Mr. Eschenbach is charged only in Count I of the sprawling Superseding Indictment, which alleges a conspiracy in violation of 18 U.S.C. § 371. That section criminalizes a conspiracy "either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." Here, the government alleges that the objects of the conspiracy were to knowingly endanger the people of Libby in violation of 42 U.S.C. § 7413(c)(5)(A), and to defraud the Environmental Protection Agency (EPA) and National Institutes for Occupational Safety and Health (NIOSH).

To make out a Section 371 violation, the government must prove beyond a reasonable doubt that there was "(1) an agreement to accomplish an illegal

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[2] Mr. Eschenbach incorporates by reference the motions for judgment of acquittal filed by Grace and the individual defendants.

objective; (2) the commission of an overt act in furtherance of the conspiracy; and (3) the requisite intent necessary to commit the underlying offense." *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994) (internal quotation marks omitted). The government must prove that Mr. Eschenbach became a member of the conspiracy knowing of at least one of its two objects and intending to help accomplish that object or objects. Working Instruction 4-W; *see also United States v. Montgomery*, 150 F.3d 983, 998 (9th Cir. 1998) (approving jury instruction on conspiracy as reflecting controlling Circuit precedent).

The Ninth Circuit has written extensively on the proof required to support an agreement to accomplish an illegal objective. In reversing the conspiracy conviction in *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), the court held that there must be sufficient "evidence of a mutual understanding to accomplish a specific objective or of an intention to be bound by any agreement." *Id*. at 889-90. While there were meetings and discussions between the defendants, they "never agreed to a definite plan." *Id*. at 889. The court went on to reaffirm that inferences of the existence of an agreement may be drawn "[i]f there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *Id*. at 890 (internal quotation marks omitted). And while "direct evidence of an agreement is clearly not essential, this evidentiary principle does not reduce the government's burden of

proof." *Id*. at 891. There must be a "concert of action" demonstrated by activities "coordinated" among the alleged conspirators. *United States v. Iriarte-Ortega*, 127 F.3d 1200, 1200 (9th Cir. 1997) (quoting *Melchor-Lopez*, 627 F.2d at 890). Moreover, membership in a group, or, as here, employment by a company, cannot provide sufficient evidence of an agreement because it would "smack of guilt by association." *United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998) (internal quotation marks omitted).

Measured against these principles of Ninth Circuit conspiracy law, the government has not sustained its burden of proving an agreement beyond a reasonable doubt.

III. THE EVIDENCE IS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ESCHENBACH CONSPIRED TO KNOWINGLY ENDANGER ANYONE IN VIOLATION OF THE CLEAN AIR ACT

The first object of the alleged conspiracy is knowing endangerment of the people of Libby, Montana, in violation of 42 U.S.C. § 7413(c)(5)(A). The government therefore must prove that Mr. Eschenbach agreed with one or more other persons to knowingly release or cause to be released into the ambient air asbestos, knowing at the time that the release places another person in imminent danger of death or serious bodily injury. *Id.*; Working Instruction 4-W. As we show below, the government's proof on this object is woefully deficient.

A. Conviction On The Knowing Endangerment Object Would Violate The Ex Post Facto Clause Because There Is No Evidence That Mr. Eschenbach Was Involved In A Conspiracy After November 15, 1990

As the Court is well aware, the knowing endangerment statute did not exist until November 15, 1990. Pub. L. No. 101-549, § 701, 104 Stat. 2399 (1990). The Ex Post Facto Clause of the United States Constitution, art. 1, § 9, cl. 3, forecloses a conviction for conspiracy to violate a statute where all the conduct in question occurred before the statute was enacted. *United States v. Brown*, 555 F.2d 407, 419-20 (5th Cir. 1977). Accordingly, the government must present evidence sufficient to prove beyond a reasonable doubt that an agreement to violate § 7413(c)(5)(A) existed after November 15, 1990, and that Mr. Eschenbach participated in that conspiracy. While the government was permitted to offer evidence of conduct before the enactment date, it was essential for the government to prove that the conspiracy existed *after* that date and that Mr. Eschenbach adhered to, recognized, and reaffirmed his participation in it. *See* Working Instruction 7-W; *United States v. Campanale*, 518 F.2d 352, 357-59 (9th Cir. 1975).

In this entire trial, the government introduced exactly *one* piece of evidence that pertains to Mr. Eschenbach after November 15, 1990: GX 595, Mr. Eschenbach's April 1992 submission, under the EPA's "Compliance Audit

Program," of Grace's 1978 Hamster Study.[3] Quite obviously, the disclosure by Grace of a 14-year old animal study in a filing signed by Mr. Eschenbach has nothing whatsoever to do with knowingly endangering the people of Libby through the release of asbestos into the ambient air. This single government exhibit comes nowhere near satisfying the government's burden of showing that Mr. Eschenbach "adhered to, recognized, and re-affirmed" his participation in a conspiratorial agreement, even if—which we do not concede—one existed before.

Given this failure of proof, conviction on the endangerment object of Count I would violate the Ex Post Facto Clause. And, because the endangerment object is only one of the two objects of the alleged conspiracy, the Court cannot give the jury the option of returning a general verdict on Count I. A conspiracy verdict that could rest on a constitutionally barred object—even if another object was valid and supported by the evidence—cannot stand. *Stromberg v. California*, 283 U.S. 359, 368 (1931). As the Supreme Court observed in *Griffin v. United States*, 502 U.S. 46, 53 (1991), "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." For these reasons, the Court must enter a

[3] Although the government stated in its opening statement that Mr. Eschenbach remained in the HS&T department until the 1990s (Tr. 83:13-15), the government failed to sponsor any evidence showing the end date of Mr. Eschenbach's employment. Therefore, even his presence at Grace after 1990 is established only by his signature on GX 595. *Cf.* Superseding Indictment ¶ 40 (Mr. Eschenbach left Grace on or about December 31, 1996).

judgment of acquittal as to Mr. Eschenbach on the knowing endangerment object of Count I.

B. Even Before 1990, The Evidence Is Insufficient To Show That Mr. Eschenbach Joined A Conspiracy To Knowingly Endanger The People Of Libby

Because the government failed to offer any evidence of Mr. Eschenbach's participation in a conspiracy after November 15, 1990, the Court need not reach the question whether the government sufficiently proved that Mr. Eschenbach joined a conspiracy before 1990. However, even regarding pre-1990 conduct, the evidence against Mr. Eschenbach was woefully deficient. Viewed in the light most favorable to the government, the most the evidence could show is:

- Mr. Eschenbach collected the results of annual medical monitoring of CPD workers, became aware of disease in workers who had past exposures to high levels of tremolite, and reported the adverse health effects to colleagues at Grace (GX 41, memo of August 23, 1976); to NIOSH (GX 239, memo of November 24, 1980 meeting with NIOSH); and to EPA (GX 333, letter to EPA of March 24, 1983). *See also* GX 80, GX 108, GX 363; Tr. 3687-89, 3790-92, 3841, 3861, 4311-13, 4387-88 (Locke).
- Mr. Eschenbach was aware of the propensity of products containing Libby vermiculite to release asbestos fibers when disturbed, because he was copied on or asked to give approval to conduct laboratory evaluations of air

sampling done in connection with product tests. GX 24A, GX 48, GX 90, GX 95, GX 120, GX 130, GX 130A, GX 130B, GX 134, GX 161, GX 164, GX 353, GX 369, GX 405, GX 423.

- Mr. Eschenbach attended conferences in 1972 and 1973 where the hazards of tremolite were discussed, and reported to others in Grace what happened at those conferences. GX 7 (June 5, 1972 memo), GX 11 (May 31, 1973 memo); Tr. 2992-94, 3118, 3125 (Duecker).
- Mr. Eschenbach was aware of the Hamster Study, a 1976-78 study of the effects of extremely high levels of tremolite injected directly into animals' pleural space (*see* GX 30, GX 144, GX 145, GX 170; Tr. 3046-47, 3055 (Duecker)); the Enbionics Report, a 1978 evaluation of x-rays of Libby and South Carolina workers exposed in the past to tremolite (*see* GX 127, GX 136A, GX 175; Tr. 3298 (Teitelbaum)); the 1985 McDonald study of morbidity and mortality of Libby workers (*see* GX 442, GX 492); and the 1986 NIOSH study of mortality and morbidity of Libby workers (GX 492).
- Mr. Eschenbach was aware that several workers at a Grace customer, O.M. Scott, had been diagnosed with "bloody pleural effusions," a condition that was not observed at Grace's own facilities. GX 190, GX 249; Tr. 5422-23, 5481-86 (Kennedy, J.).

- Mr. Eschenbach, in his position as head of Health, Safety & Toxicology, was aware of Dr. James Lockey's study of O.M. Scott workers which concluded that lower-level exposures to Libby asbestos was associated with an increase in pleural changes. *See* GX 354 (note sending Lockey article); GX 428 (Lockey paper); Tr. 5739-40 (Lockey).
- Mr. Eschenbach was aware in the early and mid-1980s that some Grace workers with lower cumulative fiber exposure levels had signs of pleural disease, including pleural thickening, calcification and plaques, on x-rays. GX 333 (letter to EPA indicating workers with less than 100 fiber years had x-ray changes); GX 484 (list of employees with cumulative fiber exposures and associated x-ray findings).

What is missing is any link between the evidence described above and the charged criminal conspiracy. Nothing in this evidence would allow a jury to infer that Mr. Eschenbach (i) agreed with anyone, (ii) to knowingly release asbestos into the ambient air in Libby, (iii) while knowing at the time of the release that it would place a person in imminent danger of death or serious bodily injury. 42 U.S.C. § 7413(c)(5)(A). To avoid duplication, Mr. Eschenbach hereby incorporates other defendants' arguments on the various elements of the knowing endangerment crime, as well as the argument that there is no evidence of an overt act in furtherance of the endangerment object after November 3, 1999. We focus below

on two specific missing elements – insufficient evidence of agreement, and knowledge.

Agreement. Although the government is not required to directly prove an agreement,

> [T]here can be no conviction for guilt by association, and it is clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator.

Melchor-Lopez, 627 F.2d at 891. There has been no evidence, direct or circumstantial, of Mr. Eschenbach and anyone else having a "meeting of the minds" to accomplish the illegal purpose of endangering people in Libby (and, of course, the conduct charged was not illegal before 1990). "The government may not rest upon proof that a defendant acted in a way that would have furthered the goals of a conspiracy *if there had been one*." *United States v. Adkinson*, 158 F.3d 1147, 1155 (11th Cir. 1998).

Knowledge. The government presented no evidence of knowledge *by Mr. Eschenbach* related to ambient air releases or endangerment *of Libby townspeople*. *See* Working Instruction 16-W; 42 U.S.C. § 7413(c)(5)(B) ("In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury—(i) the defendant is responsible only for actual awareness or actual belief possessed."). Notably, the

government admitted in its opening statement that "the charges in this case do not involve exposures to Grace workers." Tr. 86:4-5. The Court agreed today: "[T]he health of Libby mine employees is [not] relevant to any of the charges in this case," and "the Defendants are not accused of causing harm to Libby mine employees in the 1970s and 1980s." Order at 7, 9, Apr, 23, 2009, Dkt. 1104. But the only evidence the government presented regarding Mr. Eschenbach related to *non-ambient exposures to Grace workers*, to the exclusion of any evidence that the knowledge Mr. Eschenbach gained of the hazards of workers' exposures to large amounts of tremolite translated into an agreement to knowingly endanger the people of Libby.[4] The law is clear that to be convicted of a conspiracy, Mr. Eschenbach had to himself "know that there *is* a conspiracy and demonstrate a specific intent to join it." *Adkinson*, 158 F.3d at 1155. The government utterly failed to prove this critical element of a charge of conspiracy to knowingly endanger the people of Libby.

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[4] The government promised to present evidence that Mr. Eschenbach became aware of "concerns that the disease may also involve members of the community, including the workers' families" (Tr. 87:12-14), and cited specifically evidence regarding a local Libby doctor, Dr. Irons, and an insurance company report (Tr. 86-87). The government presented no such evidence to the jury, and the Court denied admission of the Irons-related evidence. Order at 6-7, Apr. 23, 2009, Dkt. 1104. The government also did not present evidence that Mr. Eschenbach knew that take-home dust caused ambient exposures, which in turn caused disease. And of course, learning of other peoples' potential, unsupported concerns about a health hazard cannot support an inference that Mr. Eschenbach himself *knew* of an actual hazard due to potential ambient exposures in the town of Libby.

IV. THE EVIDENCE IS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ESCHENBACH PARTICIPATED IN A CONSPIRACY TO DEFRAUD THE UNITED STATES

The second object of Count I charges that Mr. Eschenbach conspired to defraud the United States in violation of 18 U.S.C. § 371. The elements of this charge are familiar: The government must present evidence sufficient to prove beyond a reasonable doubt that Mr. Eschenbach (1) "entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy [was committed]." *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993); Working Instruction 5-W. The government's theory is that the conspirators agreed to withhold certain information on the hazards of tremolite that allegedly should have been disclosed to the EPA under Section 8(e) of the Toxic Substances Control Act (TSCA), and obstructed a proposed NIOSH epidemiological study in the early 1980s.

Two important principles under Section 371 must inform this Court's review of the evidence: *First*, to the extent the defrauding is alleged to have been carried out by withholding information (as opposed to making affirmative misrepresentations), the prosecution must prove that the law "clearly impose[d]" a duty to disclose the information to the government. *United States v. Murphy*, 809 F.2d 1427, 1430-32 (9th Cir. 1987) (reversing a conviction for conspiracy to

defraud under Section 371 where the applicable statute and regulation did not clearly impose a duty to disclose the subject information); *see also United States v. Tuohey*, 867 F.2d 534, 538 (9th Cir. 1989) ("[A] section 371 conviction may not be based upon a failure to volunteer information that is not required to be provided to the government"); *United States v. W.R. Grace*, 455 F. Supp. 2d 1156, 1161 (D. Mont. 2006) ("where a conspiracy charge is based upon failure to volunteer information, there may be no conviction if the information was not required to be provided or if the information was in fact provided as required").

Second, Section 371 does not make it a felony "to do *anything*, even that which is otherwise permitted, with the goal of making the government's job more difficult." *Caldwell*, 989 F.2d at 1060; *see also* Working Instruction 5-W (paraphrasing *Caldwell*). Defrauding the government cannot be made out by evidence showing merely that a person opposed, or even sought to block, a government initiative. Instead, there must be evidence of wrongful intent, which is expressed through the requirement that the obstruction be through deceitful or dishonest means. *Caldwell*, 989 F.2d at 1059.

In addressing the defraud theory, we first catalogue the evidence presented at trial that, viewed in the light most favorable to the government, could relate to this theory. We next demonstrate that the government failed to prove the existence of an agreement to defraud with Mr. Eschenbach as a participant. We then

demonstrate that there was insufficient evidence to support a finding of any duty to disclose under TSCA, or of any dishonest or deceitful conduct with respect to either EPA or NIOSH. Finally, we address the absence of evidence of an overt act in furtherance of the defraud conspiracy after November 3, 1999.

A. The Evidence Presented At Trial

Viewed in the light most favorable to the government, the evidence concerning Mr. Eschenbach showed that:

- In 1977, Mr. Eschenbach opposed hiring a private epidemiologist to conduct a study of Libby workers. Tr. 3772 (Locke). [5]
- Mr. Eschenbach may have been a member of a committee formed to address tremolite issues. Tr. 3769 (Locke).
- Mr. Eschenbach was aware of the Hamster Study (GX 30, GX 144, GX 145, GX 170; Tr. 3046-47, 3055 (Duecker)), the Enbionics Report (GX 127, GX 136A, GX 175; Tr. 3298 (Teitelbaum)), the Monson Review (GX 314), and tests showing the propensity of fibers to become airborne even when there were small amounts of asbestos in Grace products (*e.g.*, GX 24A, GX 48, GX 95, GX 120, GX 130, GX 130A, GX 130B, GX 134, GX 161, GX 164,

[5] Whether Mr. Locke's testimony remains in the record is still pending. *See* Defendants' Joint Motion to Dismiss the Indictment Due to the Government's Repeated and Intentional Misconduct (filed April 23, 2009). If stricken, the government's scanty evidence of an agreement to defraud the United States is diminished even further.

GX 353, GX 369, GX 405, GX 423; Tr. 3447, 3500 (Yang); Tr. 3583, 3600-01, 3611-12 (Locke); Tr. 5288 (Geiger)). That information was not provided to the EPA within 15 days of receipt by Grace.

- Mr. Eschenbach signed several letters and/or submissions to the EPA which transmitted information on the health effects of occupational exposure to Libby tremolite. GX 333, GX 363, GX 492, GX 595. The March 24, 1983 letter to the EPA (GX 333) stated that Grace had "no reason to believe there is any risk associated with the current uses of Libby vermiculite-containing products."
- Mr. Eschenbach attended a meeting with NIOSH researchers on November 24, 1980 to discuss a potential epidemiological study of Libby employees. GX 239; Tr. 3840 (Locke). During that meeting, Grace expressed opposition to the study. Grace's stated reason for opposition was that NIOSH had proposed studying the health effects of vermiculite, which Grace asserted was known to be benign. Grace further asserted that, because the Libby deposit was contaminated with tremolite, and tremolite was known to be a health hazard, a study of Libby was not necessary. Following the meeting, Mr. Eschenbach was copied on letters addressed to MSHA or NIOSH in which Grace reiterated its opposition to the study. GX 239, GX 245, GX 246, GX 250, GX 257, GX 263, GX 265, GX 266, GX 276.

- Mr. Eschenbach received or compiled information about the health effects of high doses of tremolite on workers (GX 41; GX 80; Tr. 1996-97 (Miller), Tr. 3687-89 (Locke)), and discussed these matters with others (Tr. 3583, 3600-01 (Locke)).
- Mr. Eschenbach received the results of air sampling performed at expanding plants, including some that exceeded the then-existing OSHA regulatory limit (GX 22, GX 29, GX 108 at p.5).

B. The Evidence Is Insufficient To Prove That There Was An Agreement To Defraud

"The agreement is the essence of the crime." *Iriarte-Ortega*, 127 F.3d at 1200. Yet in all the evidence described above, nothing supports a reasonable jury finding that Mr. Eschenbach agreed with anyone to defraud the United States. This Court recently observed:

> THE COURT: Well, why don't you tell me what the conspiracy is, because I'm missing that so far in the six weeks we've been at this. I don't know what the conspiracy is.
>
> I've listened carefully, and what I think you have proved beyond any doubt is the way Grace communicated within the organization. I think you are drawing an inference that if your name is on a memo, you are a part of a conspiracy to do something illegal and I'm not--I accept your proposition that this is an effort to prove participation in something, but where's the conspiracy?

(Tr. 4635:10-19). The government had no real answer for the Court beyond promising to "continue offering evidence" (Tr. 4636:6) and "more witnesses" (Tr.

4639:22), including forthcoming evidence of "obstructing and blocking the government" (Tr. 4638:11-12).

When pressed to identify what evidence up to that point showed the conspiracy (Tr. 4636-37), the government finally admitted what it believes to be the proof of an agreement: sending and receiving memoranda in the course of business, when the senders and recipients take what the government characterizes as "concert[ed]" action afterward (Tr. 4637:5-15). But the Court has already observed that that is *not* a conspiracy; "[t]hat's people doing their job." Tr. 4637:16-17. *Cf. United States v. Migliaccio*, 34 F.3d 1517, 1521 (10th Cir. 1994) (rejecting a Section 371 defraud conviction where proof of agreement consisted of evidence that the defendants practiced medicine together, shared a billing system, discussed insurance filings, advertised together, and performed surgery together).

As described above, much of the proof with respect to Mr. Eschenbach consists merely of showing that he received or sent memoranda and other documents addressing tremolite, its adverse health effects on workers, and its properties of friability, in the ordinary course of his job at Grace. While it is undeniable that he knew of these hazards, none of this routine business activity proves an *agreement* to do anything, much less an illegal agreement to defraud the government.

None of the testimony of Robert Locke—even accepting it for Rule 29

purposes despite all of its well-documented problems[6]— brings the government any closer to showing an agreement to defraud. Evidence of Mr. Eschenbach's opposition to the proposed epidemiological study by Dr. Brian MacMahon in 1977 is irrelevant, as the government has offered no proof that Grace was under a legal obligation to conduct its own epidemiological study. In fact, the evidence showed that no study by Dr. MacMahon ever took place on the recommendation of Dr. MacMahon himself. GX 103; Tr. 3772 (Locke). As such, there was nothing for Grace to disclose, and it is wholly irrelevant to the alleged defraud conspiracy. Indeed, in denying the admission of GX 93, a memorandum by Mr. Eschenbach, the Court observed that opposition to the MacMahon study "offers no basis upon which to argue that the goal is to conceal from the United States, nor is it indicative of any legal disclosure obligation." Order at 11, Apr. 23, 2009, Dkt. 1104.

With regard to the opposition to NIOSH, Locke's testimony cannot support a reasonable inference of an agreement *to obstruct*; at best, it shows that Mr. Eschenbach took the same position at the November 24, 1980 meeting as Grace, Mr. Favorito, and Mr. Locke himself with respect to the appropriateness of an epidemiological study of vermiculite at Libby. As we explain below in Section

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[6] The Court has already stated succinctly, "this guy is a liar. I mean--and I'm sure that the jury is going to arrive at the same conclusion." (Tr., Hr'g on Defs.' Joint Mot. to Strike the Test. of Robert Locke, Apr. 17, 2009, 241:19-20); *see also* Order at 3, Apr. 10, 2009, Dkt. 1049 (granting in part motion to compel and noting the "serious issues going to Locke's credibility and conduct inside and outside of the courtroom").

IV.D., the evidence of opposition to the study falls far below the standard of proof necessary for a reasonable jury to find the obstructing conduct required under the standard of *Hammerschmidt* and *Caldwell*. Moreover, Mr. Locke did not testify that Mr. Eschenbach received or even was aware of Mr. Locke's post-meeting memorandum setting out various "options" for future action, which included to "obstruct and block" the NIOSH study. Indeed, Mr. Locke did not offer any testimony that would support a finding that anyone followed his "options."

All that remains is evidence that the defendants may have run afoul of Section 8(e) of TSCA by failing to make required disclosures—though, as we explain in Section IV.C., *infra*, we submit that there was no violation of a "clearly impose[d]" duty sufficient to support a Section 371 charge. But evidence of a violation of a disclosure obligation is not enough, by itself, to support an inference of an *agreement to defraud*. The Eleventh Circuit's holding in *Adkinson* is instructive. There, the court held that the evidence of failure to report income to the IRS was not sufficient to prove conspiracy to defraud the United States. 158 F.3d at 1155-57; *see also United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957). The court went on to observe:

> To be sufficient, the evidence must establish an *agreement* among the conspirators with the intent to "obstruct the government's knowledge and collection of revenue due." When the government relies upon circumstantial evidence to establish a tax conspiracy, the circumstances must be such as to warrant a jury's finding that the alleged conspirators had some "*common design with unity of purpose*"

to impede the IRS.

Adkinson, 158 F.3d at 1154 (quoting *Klein*, 247 F.2d at 918). The Ninth Circuit has similarly held that "proof that an individual engaged in illegal acts with others is not sufficient to demonstrate the existence of a conspiracy. Both the existence of and the individual's connection to the conspiracy must be proven beyond a reasonable doubt." *Garcia*, 151 F.3d at 1245 (citations omitted). The government must do more than show that Grace failed to comply with the regulatory statute; it must present sufficient evidence that this failure was the product of an agreement to obstruct or impede the United States by deceitful or dishonest means.

C. The Evidence Is Insufficient To Show Defrauding Through Withholding Information Reportable Under TSCA

Insofar as one means of carrying out the alleged conspiracy was allegedly by withholding information on the adverse health effects of tremolite, the government's defrauding theory falters because the government cannot prove that the defendants violated a "clearly impose[d]" legal duty to disclose the particular information. *See Murphy*, 809 F.2d at 1430; *Tuohey*, 867 F.2d at 538; Working Instruction 5-W.

The government claims the defendants had a duty to disclose four discrete pieces of information: the Hamster Study, the Monson Review, the Enbionics Study, and various product tests. The source of the alleged disclosure obligation is TSCA § 8(e), 15 U.S.C. § 2607(e), which provides:

> Any person who manufactures, processes, or distributes in commerce as chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

A "substantial risk of injury to health or the environment is a risk of considerable concern because of (a) the seriousness of the effect and (b) the fact or probability of its occurrence." Working Instruction 6-W.

On March 16, 1978, EPA issued a guidance document for compliance with TSCA § 8(e), explaining that there are additional exceptions to the reporting requirement. Information need not be reported if it has been published by the EPA in reports, has been submitted in writing to EPA, has been published in the scientific literature and abstracted, or is "corroborative of well-established adverse effects already documented in the scientific literature" and referenced in abstract services. Statement of Interpretation and Enforcement Policy; Notification of Substantial Risk Under *Section 8(e)* ("Policy Statement"), 43 Fed. Reg. 11110, 11112; Working Instruction 6-W. Taking the statute and the Policy Statement together, it is plain that there is no disclosure obligation if information (i) does not satisfy the definition of substantial risk information, or (ii) an exemption from reporting applies. More to the point, the government has not presented sufficient

evidence for a rational juror to conclude that there was a TSCA disclosure obligation.

Hamster Study. This study involved the injection of two samples into the pleural space of hamsters, one containing 100% Libby asbestos and one containing 50% Libby asbestos. Several of the hamsters developed mesotheliomas. GX 184. Grace's study was completed in December 1978. *Id*.

The government's evidence established that Grace was not required to turn over this information under Section 8(e) because, as the evidence showed, Grace had actual knowledge that the information the study contained was known to EPA. At a conference in December 1977, Dr. William Smith presented a paper reporting on another experiment he conducted which also involved the injection of asbestiform tremolite into hamsters. GX 148B; DX 5519; Tr. 4214-15, 4219, 4236 (Locke). As Mr. Locke testified, the Grace Hamster Study was "corroborative" of Dr. Smith's other tremolite study. Tr. 4238; *see* Policy Statement at 11,112. Numerous government officials, including representatives of EPA, NIOSH, OSHA, and MESA attended that conference. Tr. 4212-14, 4236 (Locke). Even allowing for the possibility that Grace reached an incorrect judgment about disclosure, the evidence shows that the information contained in the prior Smith hamster study was so similar that no reasonable jury could conclude that Grace violated a "clearly impose[d]" duty to disclose. Indeed, the most that could be said

about the subsequent Grace study was that it was "corroborative" of the previously-reported study on the effects of asbestiform tremolite in hamsters.

Enbionics Study. This was a review of 1977 chest x-rays from Libby and South Carolina workers conducted by an outside firm called Enbionics. GX 175; Tr. 3298 (Teitelbaum). The final report, which Grace received in September 1978, showed for each worker whether the radiologists retained by Enbionics read the film as a "normal chest," "asbestos-related disease," or "non-asbestos-related disease."

The government did not present any evidence that the law "clearly impose[d]" a duty on Grace to disclose the Enbionics Review under Section 8(e). By September 1978, it was well known that occupational exposure to asbestos resulted in the appearance of "asbestos-related disease" on x-ray. OSHA had identified tremolite as asbestos, and had further stated that asbestosis and pleural disease were consequences of asbestos exposure in its 1972 preamble and regulation. DX 8967 at p.2. As Dr. Alan Whitehouse testified, these are asbestos-related diseases that can be seen on x-ray films. Tr. 1601-03. The literature on asbestos and the illnesses it causes was "vast" by 1976 (Tr. 5916 (Kover)), and in fact EPA witness Frank Kover was involved in compiling a document for the EPA in 1976 that identified asbestosis, pleural calcification and pleural plaques as health effects of occupational exposure to asbestos, two years prior to the Enbionics

Report. Tr. 5914-16 (Kover); DX 19123 at pp.76, 82 (Kover report). But again, even allowing for the possibility that Grace reached an incorrect judgment about disclosure, the evidence shows that the information contained in prior studies was so similar that no reasonable jury could conclude that Grace violated a "clearly impose[d]" duty to disclose.

Monson Review. The evidence showed that a Harvard epidemiologist, Dr. Richard Monson, prepared a report for Grace dated April 5, 1982, which provided information on the number of lung cancer and mesothelioma deaths among workers who had been employed at Libby for five years or more. Dr. Monson also compared those numbers to the numbers expected in the U.S. population as a whole and found that the Libby workers had an elevated rate of respiratory cancer deaths. GX 314.

That occupational exposure to asbestos could cause an elevated rate of lung cancer and mesothelioma was hardly information unknown to EPA in 1982. Mr. Kover's 1976 report discussed epidemiological studies finding a link between these types of cancer and asbestos exposure six years before Dr. Monson's report. DX 19123 at pp. 77-81. What is more, the evidence in this trial has shown that there were studies in the public domain associating exposure to tremolite in talc with lung cancer and mesothelioma. *See* GX 148B (Dement study of tremolite in Vanderbilt Co. talc reported at SOEH conference in Washington, D.C., December

6, 1977); Tr. 3485 (Locke). And, when EPA received Grace's TSCA disclosure of March 24, 1983, it determined that the Grace information on lung cancer and mesothelioma deaths was "corroborative of written scientific opinion on the effects of exposure to asbestiform materials." GX 340 at p.5; *see* Policy Statement, at 11,112. Where EPA itself acknowledged that Grace's information was "corroborative" of existing literature, the government's evidence could not permit a rational juror to conclude that Grace violated a "clearly impose[d]" duty to disclose under TSCA.

Product tests. Grace's brief explains at length why the product tests results, which were merely copied to Mr. Eschenbach, were not "substantial risk" information that was required to be disclosed under Section 8(e). To avoid duplication, we incorporate those arguments by reference here.

D. The Evidence Is Insufficient To Show Intent to Defraud

Distinct from the question whether the government has proven violation of a "clearly impose[d]" duty of disclosure under TSCA is whether there is sufficient proof that Mr. Eschenbach had the *purpose* of obstructing a lawful function of the federal government "by deceit, craft or trickery, or at least by means that are dishonest." *Caldwell*, 989 F.2d at 1058 (internal quotation marks omitted). *See also Touhey*, 867 F.2d at 537 (intent to defraud is an element of the Section 371 defraud prong); *Grace*, 455 F. Supp. 2d at 1161 (defrauding under Section 371

requires "willful impairment" of the government). Put another way, any failure to disclose had to have been a purposefully deceitful means through which Mr. Eschenbach sought to obstruct or impede the federal government.

On the evidence presented at trial, no reasonable juror could find that Mr. Eschenbach had an intent to defraud. To begin with, the jury cannot infer intent from the mere fact that Grace did not adhere to TSCA's 15-day reporting requirement, assuming there was such non-compliance. To hold otherwise would relieve the government of its burden of offering actual evidence of *mens rea*, and would effectively allow the government to transform negligent or even innocent mistakes concerning any regulatory reporting requirement into a crime. *See United States v. Licciardi*, 30 F.3d 1127, 1132 (9th Cir. 1994) (holding in a Section 371 defraud case that "the incidental effects of Licciardi's actions would have been to impair the functions of the BATF does not confer upon him the *mens rea* of accomplishing that object"); *Adkinson*, 158 F.3d at 1158 (simple failure to comply with a regulatory disclosure obligation, absent evidence of intent that the withholding of information was intended to defraud the United States, is not a crime under Section 371).

Moreover, any claim that Mr. Eschenbach pursued "willful impairment" of the EPA by concealing health effects information is belied where the evidence showed that Mr. Eschenbach signed Grace's letter to the EPA of March 24, 1983

reporting, under TSCA 8(e), that Grace had experienced 16 lung cancer and 2 mesothelioma deaths among its worker population. GX 333; Tr. 5873-76. That letter contained the *very same information* as the Monson study, and reported the effects of tremolite in *humans* where the Hamster Study had shown those effects only in animals. And it provided information on far more serious effects of asbestos than that contained in the Enbionics Study, which dealt only with x-ray findings in live workers. In fact, the government's evidence showed that Grace's 1983 TSCA disclosure prompted EPA to calculate—from the data provided by Grace—what EPA deemed a "statistically significant" relative risk of lung cancer of 2.4 (GX 340 at p.5), and to conclude that the mesothelioma rate was "quite significant." *Id*. No rational trier of fact could find beyond a reasonable doubt that Mr. Eschenbach acted with intent to deceive EPA by concealing health information, where he made such a significant disclosure of Grace's worker health history.[7]

The other disclosure made in the March 24, 1983 letter underscores why a reasonable jury could not find intent to conceal health effects information. Mr.

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[7] In 1986, Grace made a second TSCA disclosure, signed by Mr. Eschenbach, in which it provided the results of the McDonald epidemiological studies. Those studies contained scientific analyses of deaths from lung cancer, mesothelioma and non-malignant respiratory disease, as well as analyses of x-ray findings on current and former workers. GX 492. Having provided the McDonald study to EPA, the notion that Mr. Eschenbach or Grace was dedicated to a continuing conspiracy to conceal health effects information from the EPA becomes even more fanciful with this disclosure.

Eschenbach gave EPA information that Grace workers with less than 100 cumulative fiber years of exposure were showing signs of disease on x-ray. As of 1983, the applicable MSHA regulations permitted mine workers to be exposed to 2 fibers/cc (time-weighted) for an 8-hour day over the course of a 50 year working life. *See* 30 C.F.R. § 55.5 (1982). This works out to 100 cumulative fiber years. Tr. 2150-51 (Miller, explaining how to calculate fiber years). Grace's health surveillance program, which involved taking x-rays of workers every year (Tr. 4285 (Locke), 4950 (Morrison), 5020 (Zwang)) revealed by early 1983 that some workers were showing signs of disease even at cumulative exposure levels lower than that allowed by the regulation. GX 333. Grace reported that information in the March 1983 letter, thereby suggesting that the standard was not sufficiently protective of its workers. And, responding to EPA's request for follow-up data on the health status and fiber exposures of this group of workers (GX 340), Mr. Eschenbach on June 15, 1983 provided substantial information on 22 different workers. GX 363.

The government may contend that the last sentence of Grace's TSCA 8(e) disclosure (GX 333) contained a false statement made with intent to defraud the United States. The sentence reads: "Finally, we wish to emphasize that we have no reason to believe there is any risk associated with the current uses of Libby vermiculite-containing products." The government elicited no evidence that Mr.

Eschenbach or any other defendant knew of any risk associated with the use of products as of March 24, 1983. There was abundant evidence that products such as ZAI had a propensity to release fibers in normal use (*e.g.*, GX 108, 239A; DX 15002 (Consumer Product Safety Commission letter); Tr. 4903 (Walczyk)), but no witness testified to a quantification of the resultant risk given (i) the levels of exposure that could be expected to occur, and (ii) the frequency and duration of exposure for persons using the product. Nor did the government present evidence that a single person exposed to fibers from the use of vermiculite-containing products ever developed an asbestos-related disease.

Moreover, no reasonable jury could find that the defendants had any intent to obstruct or interfere with lawful governmental functions by making that statement. *Three years earlier*, Grace had voluntarily submitted data on the fiber exposure levels from use of its products to the CPSC. DX 15002; *see also* Tr. 4911 (Walczyk). While expressing its own view in DX 15002 that the risks were infinitesimal, Grace also presented the government with *exactly the information the government needed to make its own risk assessment*. Mr. Eschenbach cannot be found by a rational jury to have made a statement about the absence of risk from its vermiculite-containing products with intent to obstruct the United States, when Grace had already supplied the very data upon which risk calculations could be

made. And, the evidence showed that the government had taken no action to ban or limit tremolite in products in any way in response to the Grace disclosure.

E. The Evidence Is Insufficient To Show Obstruction Of NIOSH

The second means by which the alleged conspiracy supposedly was carried out was obstruction of a proposed epidemiological study by NIOSH in the early 1980s. But here again, the evidence is far from sufficient under the applicable legal standard.

The evidence showed that NIOSH approached Grace in September 1980 with a proposal that the agency conduct a study of the health effects of vermiculite. GX 230 (September 25, 1980 Banks letter). Representatives of Grace and NIOSH had a meeting on November 24, 1980 at which Grace and Mr. Eschenbach provided information on its health surveillance program (GX 239; Tr. 3841, 4292 (Locke)), and asserted to the agency that it opposed a study of vermiculite. Grace stated that its objection stemmed from the fact that the study design was geared toward learning the effects of *vermiculite*, which Grace believed was impossible given the tremolite contaminant. Grace asserted its objection at the November 24 meeting and in a series of letters to NIOSH through the winter and spring of 1981, culminating in a June 29, 1981 letter in which it argued past worker exposure to the tremolite contaminant would mask any effects of exposure to vermiculite. GX

266. Kathleen Kennedy of NIOSH testified that NIOSH was "frustrated" by Grace's position. Tr. 5502-03.

This evidence cannot support a defrauding claim under the governing legal standard. A conspiracy to defraud requires more than conspiring to make the federal government's job more difficult. *Caldwell*, 989 F.2d at 1061 ("[W]e won't lightly infer that in enacting 18 U.S.C. § 371 Congress meant to forbid all things that obstruct the government, or require citizens to do all those things that could make the government's job easier."). People are free to impair or impede the government as long as long as they do not resort to deceitful or dishonest means. *Id*. at 1060 ("The federal government does lots of things, more and more every year, and many things private parties do can get in the government's way. It can't be that each such action is automatically a felony."). The outcome in *Caldwell* illustrates this principle. There, the Ninth Circuit reversed a conviction under Section 371 where the jury could have convicted Caldwell merely because "she agreed to help obstruct the IRS, even if she didn't agree to do so deceitfully or dishonestly," thereby merely "conspir[ing] to make the IRS's job harder." *Id*. at 1061.

Here, the evidence viewed in the light most favorable to the government shows only that Grace disagreed with NIOSH's position that it was appropriate to conduct a study of vermiculite, and lobbied NIOSH and MSHA officials to change

or abandon the study. NIOSH got "frustrated," according to Ms. Kennedy. Tr. 5502-03. This kind of interaction between the government and regulated parties is an entirely routine aspect of our democratic process—yet here, where the government has reached back in time to find any evidence that shows the slightest opposition by Grace to a federal agency, the government wants the jury to find it a felony. The memo written by Robert Locke after the November 24, 1980 meeting with NIOSH in which he suggests one option is to "obstruct and block" NIOSH does not change this conclusion. GX 239. Locke testified that he wrote the memo *on his own* and admitted that he was given much less involvement in tremolite matters after writing the memo. Tr. 4322-26. Nor does his use of the words "obstruct and block" support any inference of a conspiracy to obstruct in light of Grace's *actions*, which simply involved expressing an opinion to NIOSH about the merits of a study.

No evidence in this trial even remotely suggests that Mr. Eschenbach or Grace presented false or misleading information to NIOSH, or that they acted deceitfully or dishonestly in opposing NIOSH's position. To the contrary, the disagreement was by no means clandestine, but was in all respects direct, clear and outspoken. In fact, the proof is in the pudding: once NIOSH changed the study to focus on the health effects of *tremolite*, Grace indisputably cooperated to the fullest. *See*, *e.g.*, GX 268. That cooperation resulted in NIOSH's publication in

the scientific literature of morbidity and mortality studies concerning the Libby worker population. *See* Tr. 5584 (Banks), 1986 (Miller); GX 492 (informing EPA that NIOSH had completed and publicly presented the results of its study). The government's evidence at best shows that Mr. Eschenbach and Grace engaged in lawful advocacy that made the government's job more difficult, and is a far cry from that required to show a person defrauded the United States through deceitful or dishonest means. *See Caldwell*, 989 F.2d at 1061.

F. There Is No Evidence Of An Overt Act In Furtherance Of The Alleged Defrauding Conspiracy Within The Limitations Period

Even if the evidence were sufficient to show that Mr. Eschenbach participated in a conspiracy to defraud, judgment of acquittal is required because there is no evidence from which a reasonable jury could find beyond a reasonable doubt that a conspirator committed an overt act in furtherance of the conspiracy after November 3, 1999. *See* Working Instruction 4-W.[8] There certainly was no evidence that Mr. Eschenbach engaged in such an act after that date; indeed, the only evidence related to conduct of Grace and Alan Stringer. Grace has fully briefed this issue in its Rule 29 motion and we will not repeat it here.

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[8] As noted earlier, the government told the jury in opening statement that Mr. Eschenbach retired from Grace at the end of 1996, but the government chose not to introduce evidence bearing on that point during its case.

V. COUNT I CHARGES MORE THAN ONE CONSPIRACY

The foregoing demonstrates that there is insufficient evidence from which a reasonable jury could find that Mr. Eschenbach participated in a conspiracy to knowingly endanger the people of Libby or defraud the United States. For that reason, a judgment of acquittal should be granted. But even if there were evidence of his participation in a conspiracy, Mr. Eschenbach still must be granted a judgment of acquittal because the evidence at trial conclusively demonstrates that the conspiracy charged in Count I was not a single conspiracy. As a result, conviction of Mr. Eschenbach on Count I would violate his rights under the Fifth and Sixth Amendments to a unanimous jury verdict and to avoid double jeopardy.

It is axiomatic that the government must prove that the conspiracy charged in Count I was a single conspiracy. *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1225 & n.16 (D. Mont. 2006).[9] This is particularly important here, where any distinct conspiracy completed before November 3, 1999 would be barred by the statute of limitations. Whether the proof shows a single conspiracy is evaluated under the "overall agreement" test of *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988), which takes account of four factors: "[1] the nature of the scheme, [2] the identity of the participants, [3] the quality, frequency and duration

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[9] While the Court denied the defendants' pretrial challenge to the Indictment on duplicity grounds, the Court recognized that the issue of multiple conspiracies could be raised after the government's case-in-chief. 429 F. Supp. 2d at 1217.

of each conspirator's transactions, and [4] the commonality of times and goals." *Id*. at 1401. Moreover, to the extent the government seeks to show that subsequent acts of concealment are part of a single conspiracy, it must demonstrate that those acts were part of the original conspiratorial agreement. *Grunewald v. United States*, 353 U.S. 391, 401-02 (1957).

Assuming *arguendo* that the government presented sufficient evidence of conspiracy, it plainly could only have shown multiple conspiracies—a conspiracy to defraud the United States in the 1970s and 1980s by withholding information from the EPA and obstructing NIOSH, a distinct conspiracy to release asbestos in the town of Libby, and yet a third conspiracy to obstruct the EPA in connection with its CERCLA investigation and cleanup activities after 1999. The reason why the evidence showed multiple conspiracies is fully developed in Grace's brief, and Mr. Eschenbach incorporates those arguments by reference to avoid burdening the Court.

We simply observe here that the duplicity argument applies with full force to Mr. Eschenbach, as all of the conduct he allegedly engaged in related to withholding health effects information from the EPA and seeking to delay the NIOSH study occurred long before the EPA showed up in Libby in November 1999. Indeed, the last conceivable act of defrauding by Mr. Eschenbach is his submission of the Hamster Study in 1992 while failing to submit other, previous

health studies. *See* GX 595. The main focus of Mr. Eschenbach's activities was in the late 1970s and early 1980s, decades before the alleged obstruction of the cleanup. There was no proof that he had anything whatsoever to do with obstructing the EPA after 1999; indeed, only Grace and Stringer were involved in that activity. Courts have found multiple conspiracies in cases involving far less extreme gaps in time and participation in the alleged conspiracies. *See United States v. Juodakis*, 834 F.2d 1099, 1103 (1st Cir. 1987); *United States v. Goss*, 329 F.2d 180, 181-83 (4th Cir. 1964).

VI. CONCLUSION

This prosecution has gone on for long enough, and has finally been revealed for what it is – grasping at straws and wholly lacking in factual support. For the reasons set forth above, the Court should enter a judgment of acquittal as to Defendant Eschenbach.

Dated: April 23, 2009

RESPECTFULLY SUBMITTED,

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